

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION**

JAMES M. HARRINGTON,

Plaintiff,

v.

Case No. 3:08-CV-00251-FDW

CIBA VISION CORPORATION

Defendant.

**CIBA VISION CORPORATION'S RULE 5.1 NOTICE
OF CONSTITUTIONAL QUESTION**

Pursuant to Rule 5.1 of the Federal Rules of Civil Procedure, CIBA VISION CORPORATION ("CIBA"), Defendant, files this Notice regarding its constitutional challenge to 35 U.S.C. § 292 (the false patent marking statute). As set forth in CIBA's Motion to Dismiss and accompanying Memorandum [Docket Nos. 16, 17], filed July 21, 2008 in the above captioned matter, CIBA is challenging the constitutionality of section 292 as applied to uninjured plaintiffs who rely on its "any person may sue" language to bring "qui tam" actions to enforce the statute wholly on behalf of the United States.

The question raised by CIBA's challenge is whether section 292, if interpreted to authorize a qui tam suit by an uninjured plaintiff without standing to bring an action on his own behalf, violates the "Take Care" and "Appointments" clauses of Article II of the Constitution (U.S. Const. Art. II, § 3; § 2, Cl. 2) by failing to require the relator to notify the United States of the action, failing to vest substantial (or any) control of the action in the Attorney General, and

failing to include any of the procedural safeguards that have been held to preserve the constitutionality of other qui tam statutes, such as the False Claims Act.

Notice is also hereby provided that a similar Article II challenge to section 292 is pending before Judge Brinkema in the Eastern District of Virginia in the case of *Pequignot v. Solo Cup*, Civil Action No. 1:07cv897. The docket in that case indicates that the United States is in the process of reviewing the challenge.

Respectfully submitted, this the 29th day of July, 2008.

s/Steven D. Moore
Steven D. Moore (NCSB # 23367)
Attorney for Defendant
KILPATRICK STOCKTON LLP
1001 West Fourth Street
Winston-Salem, NC 27101
Telephone: (336) 607-7300
Facsimile: (336) 607-7500
E-mail: STMoore@KilpatrickStockton.com

Thomas P. Steindler
McDermott Will & Emery LLP
6009 13th Street, N.W.
Washington, DC 20005-3096
Telephone: (202) 756-8000
Facsimile: (202) 756-8087
E-mail: tsteindler@mwe.com
(Admitted *Pro Hac Vice*)

Corey Salsberg
McDermott Will & Emery LLP
28 State Street
Boston, MA 02109-1775
Telephone: (617) 535-4000
Facsimile: (617) 535-3800
E-mail: csalsberg@mwe.com
(Admitted *Pro Hac Vice*)

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing CIBA Vision Corporation's Rule 5.1 Notice of Constitutional Question was served on this 29th day of July, 2008 on the following in the manner indicated:

By Certified Mail:

United States Attorney's Office
227 West Trade Street
Suite 1650
Charlotte NC, 28202
(704) 344-6222

By ECF:

Glen A. Cipriani
The Harrington Practice, PLLC
10130 Mallard Creek Road, Suite 110
Charlotte, NC 28262
Tel: (704) 315-5804
Fax: (704) 625-9259

s/Steven D. Moore
Steven D. Moore (NCSB # 23367)